

First Supplement to Memorandum 99-25

Uniform Principal and Income Act: Proposed Amendments to AB 846 (Revised Language)

This supplement forwards some clarifying revisions suggested by James Deeringer (liaison with the State Bar Estate Planning, Trust and Probate Law Section Executive Committee). The staff has made some further technical revisions for style purposes. These revisions are consistent with the consensus the working group arrived at in the March 19 meeting mentioned in Memorandum 99-25. (Item numbers below are the same as in the main memorandum.)

2. Exercise of Power To Adjust Is Fully Discretionary (see Memo 99-25, p. 3)

Subdivision (g), to be added to Section 16336, should be revised as follows:

(g) Nothing in this section or in this chapter is intended to create or imply a duty to make an adjustment under this section. A trustee is not liable under this chapter for refusing or choosing not to make an adjustment.

The added language is consistent with the first sentence of subdivision (g). The purpose of the subdivision is to make clear that the Uniform Principal and Income Act *itself* does not create or imply a duty to make an adjustment. In other words, the existence of the power to adjust should not be thought to imply a duty to use it. That is the purpose of subdivision (g).

The first paragraph of the Comment would be expanded with the following, and further clarified as proposed by Mr. Deeringer:

Subdivision (g) reaffirms and expands on the portion of subdivision (a) providing that the trustee *may* make an adjustment *to the extent the trustee considers necessary*. Subdivision (g) makes clear that the existence of the adjustment power does not create or imply a duty to use it. The trustee may, without liability, decide as an institutional policy or with respect to individual trusts or classes of trusts, whether and under what conditions it will use the adjustment power. This rule is a corollary of the principle stated in Section 16202 that the grant of a power does not authorize its use and that exercise of a power is subject to fiduciary duties.

Subdivision (g) does not affect any liability that may accrue ~~under result from breach of a duty under other law~~, such as the duty to comply with the prudent investor rule (Section 16046) or the duty to treat beneficiaries impartially (Section 16003).

Mr. Deeringer felt that the “accrue” language was not clear. The staff thinks his proposal is an improvement.

3. Consequence of Objection to Proposed Action (Memo 99-25, pp. 3-4)

Section 16337, the notice of proposed action provision, should be revised to make subdivision (g) consistent with subdivision (f) in a case where the trustee does not take the proposed action due to an objection. Mr. Deeringer’s clarifying language is shown in double-underscore (language earlier proposed is shown in strike-out and underscore):

(f) A trustee is not liable to a beneficiary for an action regarding a matter governed by this chapter if the trustee does not receive a written objection to the proposed action from the beneficiary within the applicable period and the other requirements of this section are satisfied. If no beneficiary entitled to notice objects under this section, the trustee is not liable to any current or future beneficiary with respect to the proposed action.

(g) If the trustee receives a written objection within the applicable period, either the trustee or a beneficiary may petition the court to have the proposed action taken as proposed, taken with modifications, or denied. In the proceeding, a beneficiary objecting to the proposed action has the burden of proving that the trustee’s proposed action should not be taken. A beneficiary who has not objected is not estopped from opposing the proposed action in the proceeding. If the trustee decides not to implement the proposed action, the trustee shall notify the beneficiaries of the decision not to take the action and the reasons for the decision, and is not liable to the trustee’s decision not to implement the proposed action does not itself give rise to liability to any current or future beneficiary with respect to the unimplemented action. A beneficiary may petition the court to have the action taken, and has the burden of proving that it should be taken.

Respectfully submitted,

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Assistant Executive Secretary